FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 1 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 168

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

CHARLES F. O'NEALL
1625 K Street, N.W.
Washington 6, D. C.
Attorney for Petitioner

Of Counsel:

FRANCIS C. BROOKE
Washington, D. C.

WILSON PRESS PRINTING CO. - RE 7-6004 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Statutes Involved	3
Regulation Involved	4
Statement of the Case	6
Jurisdiction of the Court below	9
Reasons Urged for Granting the Writ	9
Conclusion	23

CASES CITED

Federal Communications Commission v WJR (1948) 337 US 265 ..... 21, 22

MISCELLANEOUS CITATIONS

Congressional Record, 3 February 1927 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Federal Broadcasting System, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case which was on petitioner's appeal from an order of the Federal Communications Commission, dated 14 March 1958.

OPINIONS BELOW

The opinion of the Court of Appeals was unreported when this petition was prepared. It appears on page 25 of the Appendix to this petition. The Federal Communications Commission issued its opinion on 14 March 1958 (the same date as its above cited order) and its

text appears on pages 58-162 of the Record; see, also, Supp. J. App. 1-26.[1]

JURISDICTION

The judgment of the Court of Appeals was dated and entered 2 April 1959.

28 USC 1254(1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

QUESTION PRESENTED FOR REVIEW

Although other questions were included among the propositions urged in the Court of Appeals, the primary question upon which the decision of this Court is sought is whether the Commission has correctly construed the term "originating station" as intended in 47 USC 325(a). This question may also be phrased thus: Whether the term "originating station" as employed in 28 USC 325(a) can be construed to include a slave or network affiliated station, that neither originates the program nor owns any interest therein? It is to be observed that under the Commission's regulations the slave station is empowered to refuse its consent to the rebroadcast of such programs and to thereby make rebroadcasting illegal even if the owner desires rebroadcasting.

It should be noted that neither the question nor the Commission suggest that the slave or affiliated station can

---

[1] There are references herein to the Joint Appendix (J. App. ——) which was employed in the first rebroadcast case in the Court of Appeals; i.e., FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION (1956) 97 US App DC 293, 231 F2d 246 (Appeal No. 12,494). Each reference to the "J. App." has a parallel citation to the Record in the Court of Appeals in that case.

This petition also refers to material appearing in the Supplemental Joint Appendix (Supp. J. App. ——) which was employed in the second rebroadcast case in the Court of Appeals, i.e., Appeal No. 14,418, the judgment from which this petition comes.

actually authorize a rebroadcast. All that the veto-invested slave station can do is to prevent rebroadcast of a program which belongs to others and in which it owns no interest—thus does the Commission invest the slave station with the sort of control that is usually inseverable from ownership. Under the Commission's regulations, at least two consents are necessary whereas the statute itself requires only "the express *authority* of *the* originating station."

A subsidiary question arises if the question in the preceding paragraph is answered in the affirmative, namely, whether a slave or affiliate station's refusal to consent to the rebroadcast of programs in which it owns no interest is contrary to the public interest, or otherwise demonstrates its unfitness as a broadcast licensee. The Commission itself has stated that an unreasonable refusal to consent to rebroadcast "may well constitute conduct going to the qualifications of a licensee to operate in the public interest." An answer to such an inquiry necessarily involves an evaluation of the criteria which the Commission employs in determining whether the refusal to grant rebroadcast consent is reasonable or not. The Commission has specified six such criteria, which the Court of Appeals declined to review.

STATUTES INVOLVED

The basic statute involved, originally enacted as Section 28 of the Radio Act of 1927, ch. 169, 44 Stat. 1162, now known as Section 325(a) of the Communications Act: 47 USC 325(a) reads as follows:—

"(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, *nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express*

authority of the originating station." (Emphasis supplied)

Since the Commission says that in appraising the reasonableness of network station's refusal to consent to the rebroadcast of a program in which it owns no interest "whether the program [for the rebroadcast of which its consent is sought] has public service aspects that make its wide dissemination to the public clearly desirable", the following statute is pertinent:—

"47 USC 325 reads:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

REGULATION INVOLVED

Title 47, Sec. 3.121 of the Code of Federal Regulations (1958) provides in part here pertinent:—

"*Rebroadcast.* (a) The term 'rebroadcast' means reception by radio of the program of a radio station, and the simultaneous or subsequent retransmission of such program by a broadcast station.

"Note 1: As used in § 3.121, program includes any complete program or part thereof, or any signals if other than A-3 emission.

"Note 2: In case a program is transmitted from its point of origin to a broadcast station entirely by telephone facilities in which a section of such transmission is by radio, the broadcasting of this program is not considered a rebroadcast.

"(b) The licensee of a standard broadcast station may, without further authority of the Commission, rebroadcast the program of a United States standard or FM broadcast station, provided the Commission is notified of the call letters of each station rebroad-

cast and the licensee certifies that express authority has been received from the licensee of the station originating the program.

"Note: The notice and certification of consent shall be given within 3 days of any single rebroadcast, but in case of the regular practice of rebroadcasting certain programs of a standard broadcast station several times during a license period notice and certification of consent shall be given for the ensuing license period with the application for renewal of license, or at the beginning of such rebroadcast practice if begun during a license period.

"(c)(1) The licensee of the standard broadcast station located within a state or the District of Columbia, may, without further authority of the Commission rebroadcast on a noncommercial basis a noncommercial program of a United States international broadcast station.

• • • • •

"Note 1: The broadcasting of a program relayed by a remote pick-up broadcast station (§ 4.401 of this chapter) is not considered a rebroadcast.

"Note 2: Informal application may be employed.

"Note 3: By Order No. 82, dated and effective June 24, 1941, until further order of the Commission, § 3.121(d) is suspended only insofar as it requires prior written authority of the Commission for the rebroadcasting of programs originated for that express purpose by United States Government radio stations.

"(e) In case of a program rebroadcast by several standard broadcast stations, such as a chain rebroadcast, the person legally responsible for distributing the program or the network facilities may obtain the necessary authorization for the entire rebroadcast both from the Commission and from the person or licensee of the station originating the program."

• • • •

STATEMENT OF THE CASE

Petitioner is the licensee of WSAY, an amplitude modulation broadcasting station in Rochester, New York. The respondent WBBF, Inc., is the corporate licensee of another amplitude modulation broadcasting station in Rochester, now known as Station WBBF, formerly known as WARC.

From time to time during the period July 1952 to January 10, 1953,[2] petitioner asked WBBF for its consent to rebroadcast programs carried by WBBF (then known as WARC):—

> "* * * when the facilities of [WBBF] are hired or purchased, either directly by a sponsor, or sponsors, or their agencies, or indirectly through the facilities of a network, and when this signal * * * is broadcasting the program or programs of a sponsor or sponsors, which desire, or may desire, their programs rebroadcast by radio station WSAY; it being expressly understood that Station [WBBF] does not

---

[2] The reason petitioner's request of WBBF antedates the judgment of the Court of Appeals by so great a period of time is that the judgment from which this petition comes was the second judgment of the Court of Appeals on questions which included the one here presented. The first rebroadcast decision FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION (1956) 97 US App DC, 293, 231 F2d 246, as did the proceeding here appealed from, involved an attack on respondent's right to refuse to consent to a rebroadcast of programs in which it owned no interest and, thereby, to preclude petitioner's right to rebroadcast (after obtaining consent from the owner of such material) any of the programs on which such dead-hand consent was withheld. The first appeal was occasioned because the Commission refused to consider the question on the ground that it had not been raised with sufficient specificity to satisfy the requirements of the protest statute, 47 USC 309(c). The Court of Appeals reversed and directed the Commission to determine whether respondent's conduct, in this respect and others, was contrary to the public interest or otherwise demonstrated respondent's unfitness. (97 US 294, 296-7, 231 F2d 246, 248-50).

> have any property right in the sponsor's programs, and thereby does not in this permission intend to convey any such property right to Station WSAY."[3]

WBBF's refusal to give such consent formed one of the bases of Petitioner's protest [under 47 USC 309(c)] of a grant of renewal of respondent's broadcasting license. (Record pp. 199-200, J. App. 78, par. 15).

The Commission refused a hearing on petitioner's protest. As more fully set forth in Footnote 2, *supra*, petitioner appealed from that denial, and the Court of Appeals reversed. On remand, still without a hearing, the Commission determined (Supp. J. App. 17, Par. 14) that respondent WBBF's refusal to consent to rebroadcast of programs in which it owned no interest was not illegal and did not contravene public policy. It also determined (Supp. J. App. 17-23, Pars. 14-16) that the blanket refusal of consent by respondent WBBF was not contrary to the public interest, and did not demonstrate unfitness on respondent's part to continue as a licensee. The Commission identified six criteria by which the reasonableness of a slave or network station's refusal to consent to rebroadcast of program materials in which it owns no interest could be determined, and in these words:—

> "[D]eterminations as to whether refusals are justified or unjustified will depend upon the facts of particular cases, and upon an evaluation of such factors as
>
> '[1] whether licensees of stations . . . act in concert with each other or with other interests in refusing rebroadcast requests,
>
> '[2] whether requesting stations serve the same or a different area as the station whose program they wish to rebroadcast,
>
> '[3] whether the request is for permission to carry a simultaneous rebroadcast or to rebroadcast a program at some subsequent date,

[3] Record p. 206, J. App. 85.

> '[4] whether the requesting station has indicated a willingness to pay a reasonable share of the legitimate costs of the originating station,
>
> '[5] whether or not other persons having interests in the program have requested or agreed to the rebroadcast, and
>
> '[6] whether the program concerned has public service aspects that make its wide disseminating to the public clearly desirable'."[4]

Petitioner appealed. The Court of Appeals affirmed. This petition followed.

In the opinion from whence this petition comes, the Court of Appeals disposed of the question now presented to this Court in the following language:—

> "Concerning [petitioner's] request for rebroadcasting privileges, the Commission determined that [petitioner] had sought essentially blanket authorization to rebroadcast all programs carried by WBBF in which WBBF may have no proprietary interest. It concluded, *inter alia*, that WBBF was justified in refusing to grant such authorization absent (1) more specificity as to the programs [petitioner] sought to rebroadcast, the time they would be rebroadcast and the financial provisions to be made for such rebroadcast privileges or (2) a showing that WBBF acted in concert with another station, or other interests in refusing the request.
>
> "We think the Commission's action in rejecting this ground of the protest was correct because the request for rebroadcast authority was patently unreasonable in scope." (App. 27, *infra*).

And, at this juncture, the Court of Appeals appended its footnote 6, which reads thus:—

> "We do not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a) of the Communications Act, as

[4] Supp. J. App. 20-21; numerals in brackets added.

"expressed in the 1952 rule making proceedings to amend the rebroadcasting rules. *See Report on Amendment of the Rebroadcasting Rules*, 1 PIKE AND FISCHER RADIO REG. (Pet. 3) 91:1131 and 1136."

It is to be observed that the Commission did not rule that petitioner's request was "unreasonable", and neither the Commission nor the respondent WBBF advanced that contention in the Court of Appeals.

JURISDICTION OF THE COURT BELOW

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of petitioner's appeal under the provisions of 47 USC § 402(b)(6).

REASONS URGED FOR GRANTING THE WRIT

This petition presents a question of nation-wide concern and interest. It presents an issue which directly affects every radio listener and TV viewer[5] in the United States, and which is of concern to every commercial licensee, all networks, all advertising agencies that deal with broadcasting accounts, and the sponsors of all broadcast programs. The question itself is encased in the rebroadcast provision of the Radio Act of 1927 [now cited as 47 USC 325(a)] which this Court has never construed, and which the Court of Appeals refused to interpret.

As construed by the Commission—and the Commission is content to concede that the meaning it reads into the

[5] In a TV case now pending in the Court of Appeals (FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION, Appellee, and WHEC-TV, and WVET-TV, Intervenors, Appeal No. 15,505) the same rebroadcast policy is again involved. In view of the recency of the ruling from which this petition comes, the petitioner will do no more in Appeal No. 15,505 than to note the pendency of this petition so as to save that question in that appeal pending final disposition of the issue by this Court.

statute is not that which Congress intended[6]—the utilization of millions of dollars worth of outstanding radio broadcast material, the rebroadcasting of which would be in the public interest, can be (and is) kept from the public because a licensee which is *not* "the originating station", but which is a mere slave or network station (the networks themselves being uncontrolled by the Commission) has authority, under the Commission's regulations, to refuse its consent to the rebroadcast of materials in which it owns no interest, and to thereby make rebroadcast of such program illegal even if the owner wants it to be rebroadcast.

The Court of Appeals failed to decide a properly presented and necessary question of substance relating to the construction and application of a statute of the United States [47 USC 325(a)] which has not been, but should be, settled by this Court. Thus, the Court of Appeals expressly predicated its decision upon the sole ground that petitioner's request "was patently unreasonable in scope"; and, in footnote 6 of its opinion, the Court pointed out that it did not reach the validity of the Commission's interpretation of Section 325(a).

Just as negligence does not exist in thin air, so too is reasonableness a relational concept. Thus, before there can be any real question as to whether a request for permission to rebroadcast is reasonable in scope, it must appear that the request is directed to, and considered by, the real party in interest. And it is precisely at this point, and on this point, that the statute and the Commission part company. The statute requires "the express authority of the originating station" and it requires nothing more. However, the Commission requires "the consent of the station whose radio signals are received . . . even in those situations where property rights

[6] See, pp. 19/20 of "Brief for Appellee" filed in the Court of Appeals in Appeal No. 14,418, the proceedings from which this petition comes.

in the program may rest elsewhere."[7] The decisional paragraph in the ruling of the Commission that is directly involved in this petition (paragraph 15, Supp. J. App. 19-21) was expressly predicated upon this construction of Section 325(a).

As is at once evident, the expression "the station whose radio signals are received" is much broader than "the originating station", for the former includes slave or network affiliates which own no interest in the program. The fact of the difference above noted at once raises the question of whether the Commission has construed the statute correctly. If it has not done so, it is pointless for any court to be concerned with the possible niceties of the permissible scope of a request for rebroadcast permission. Such an inquiry would be important only if made to, and considered by, the entity whose express authority is required by the statute; and, there will be ample time for the Commission and or the Court of Appeals to adjudicate on the reasonableness of such a request if and when stations desiring to make rebroadcasts are permitted to direct their requests of the real party of interest for final authorization as contemplated by Section 325(a). The prime question, therefore, is not whether petitioner's request was reasonable, but is instead whether a slave or affiliate station is invested by Section 325(a) with effective power to deny rebroadcast requests.

The question on which the Court of Appeals did rule is one this Court has not settled, namely, whether it is "patently unreasonable" to ask a slave or network station for blanket consent to rebroadcast programs in which it owns no interest when the slave station is told that before the material is rebroadcast, the express authority of the owner or originating station will be obtained.

---

[7] Supp. J. App. 20—for full text of the Commission's "Report and Order", see Record pp. 142-147, J. App. 37, 43.

Since the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction of appeals from the Federal Communications Commission, the fact that there is no conflict with another Circuit is immaterial.

The Court of Appeals determined that petitioner's request for rebroadcast consent was properly refused because it "was patently unreasonable in scope." Petitioner respectfully urges that that opinion is as untenable as it is unfathomable.

First, it should be noted that the refusal (Record p. 217, J. App. 96) was just as broad in scope as the request. Further, respondent never at any time suggested that it would give its consent to rebroadcasts if petitioner would limit the times within which it rebroadcast, list the exact programs or types of programs as to which rebroadcasts were contemplated, nor did WBBF ever indicate the financial terms or arrangements it would require.[8] As the Court of Appeals stated in its first opinion relating to rebroadcast rights, 97 US App DC at 296, 231 F2d at 249:—

> "* * *. The new owners of WBBF . . . nowhere showed any inclination to grant *any* rebroadcast privileges to [petitioner]. * * *. (Emphasis supplied)

[8] After respondent had intimated in one of their refusals that financial negotiations might settle the matter, the petitioner, in at least one of its requests (December 30, 1952) stated:—

> "* * *. I am most anxious to determine what you feel you are entitled to, to allow us to rebroadcast sponsors' programs. *I am willing to immediately negotiate with you for any remuneration which you feel you should receive for the services which you would afford us and for which you are not already paid by the sponsors of these programs.* I await your reply." (App. 35-36, emphasis supplied)

However, since respondent never intended to give any consent anyhow, nothing came from the above offer.

Again, in that first opinion, the Court said:—

> "* * *. We do not understand that the Commission has passed on the substantive issues here involved: at least it has not done so with clarity. True, it advised [petitioner] by letter in an earlier proceeding that WBBF's refusal to allow re-broadcast privileges did not contravene the Commission's rules or the Communications Act. * * *. But lack of actual violation of law or regulation is not decisive: the question is whether the alleged conduct is contrary to the public interest, or otherwise demonstrates unfitness of the licensee. * * *. The Commission should approach the matter in that light. Only if it is clear from the face of the protest, taking all the protestant's allegations as true, that there is no real merit in protestant's position or substantial possibility that a hearing will reveal merit, should the protest be rejected without a hearing." 97 US App DC at 297, 231 F2d at 250.

But, on the second appeal, the Court (as hereinbefore noted) concluded that petitioner's request "was patently unreasonable in scope."

Precisely the same request was before the Court of Appeals in both cases. If, as that Court now says, petitioner's request was "patently unreasonable", it could have said so the first time. Certainly, if petitioner's request really was "patently unreasonable", the Court of Appeals subjected all parties to the expense of a useless proceeding when, as it did in its first re-broadcast decision, it remanded on the precise question of the propriety of the refusals.

Again, the fact that petitioner did not allege that respondent WBBF's blanket refusal of rebroadcast consent was determined upon in concert with another station or other interests, is immaterial. Joint action could make the impropriety worse, but an otherwise unjustified or improper act is not to be deemed proper or in the public interest merely because done single handedly.[9]

[9] None of the anti-trust statutes were invoked by petitioner.

Thirdly, neither the Commission or the Court of Appeals have chosen to suggest how WBBF's refusal to consent to rebroadcast could be less than contrary to the public interest, since the consent it withheld was that of a slave or network station which owned no interest in the program, and its refusal prevented the public from hearing rebroadcasts of programs that WBBF, certainly, could not say were not good.

The deeper question (i.e., more basic than the Commission's possible opinion on public interest) is whether it is arbitrary and capricious for the Commission to invest a slave or network affiliated station with the power to prevent a rebroadcast by requiring the slave station's consent even when it owns no interest in the broadcast material and, when, in fact, it has been paid in full for (and made a profit from) the initial broadcast. In the Commission's own words "Section 325(a) [has now been] interpreted as providing that no program may be rebroadcast without the consent of the station whose radio signals are received . . . . even in those situations where the property rights in the program material may rest elsewhere." And, the Commission then went on to confess that as interpreted by it, "Section 325(a) may no longer accurately reflect present conditions [e.g., network broadcasting and sponsor-ownership of program material] or effectively carry out the original intent of Congress." (Supp. J. App. 20/21).

The only requirement in Section 325(a) for lawful rebroadcast is "the express authority of the originating station." Clearly, one first step in working out an interpretation of Section 325(a) is to ascertain the meaning of the term "originating station", and to thus identify the interest Section 325(a) seeks to protect. But, even though light on the legislative intent was made available to both the Commission and the Court of Appeals, the former has produced a rule which, contrary to the public

interest, insures an absolute minimum of rebroadcasting, while the Court of Appeals simply declined to construe the statute.

The legislative history[10] of the phrase "the express authorization of the originating station" is straightforward, uncomplex, clear, and convincing—and further, it makes good sense. Thus, Senator Dill, the father of Section 28 [now Section 325(a)] said:—

> "Mr. Dill. * * *. As to section 28, providing that no person, firm, or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to it. The provision referred to does not prevent rebroadcasting, but it does require those who would rebroadcast to get permission from the original broadcaster. * * *" (Congressional Record, p. 2880, 3 February 1927).

After Senator Dill gave the Senate the above quoted explanation, the Conference Report was adopted, and the precise language that is today cited as 47 USC 325(a) soon thereafter became law.

The Court of Appeals was in error when, as stated in Footnote 6 to the opinion in the present case, it declined to consider "the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a)." In the proceedings adverted to by the Court of Appeals in that footnote, the Commission determined that refusals to allow rebroadcast must not be unreasonable (for pertinent text, see quotation on page 8, *supra*), but its deci-

[10] Congressional Record, pp. 2869-2882, especially at p. 2880, 3 February 1927.

sion was predicated on the unwarranted assumption which plainly contradicts the legislative history of Sec. 325(a) that the assent of a station that owned no interest in the program to be rebroadcast could be required merely because it was that particular station's signal that was received. The statute itself contemplates rebroadcasts when "express authority of the originating station" is obtained. Section 325(a) does not contemplate multiple requests, nor the consent of parties that have no actual legal interest. Section 325(a) does not try to cripple or hamstring rebroadcasts. The Commission is not at liberty to require the consent of a slave station especially when the slave station *cannot* authorize, even if it would, the rebroadcast rights sought. Congress clearly intended, and Section 325(a) clearly gives, radio stations protection against rebroadcasting of *their* programs only when they are the "originating station", i.e., a station that owns an interest in the broadcast material.

The following example illustrates the error (and inappropriateness) of the Commission's construction of Section 325(a). WXYZ in New York City, the owner and originator of the program known as "Old Favorites", leases WBBF's time each week, Wednesday from 10 to 10:30 p.m., so that "Old Favorites" can be heard in Rochester, New York. WBBF is paid *in full* for carrying the program, and it has no power to authorize anyone to rebroadcast it. WBBF has about the same interest in "Old Favorites" as Western Union has in a telegram—and, actually, has as much lawful right to restrain its circulation. But, if WSAY wants to rebroadcast "Old Favorites", WSAY must obtain WBBF's consent! Why? Because the Commission says so. Certainly the Act does not. WSAY is entirely ready to ask WXYZ for *its* "express authority" [which is all Section 325(a) requires], but since the paid-for signal of WBBF is the source through which WSAY receives the program material, the

Commission insists that WBBF's rebroadcast consent is indispensable.

Even if it may properly be assumed that a station in the status of respondent WBBF, Inc., has (under the Act) any right to refuse to consent [11] to rebroadcast of programs in which it owns no interest, an important question remains for this Court's decision: Is it proper for a broadcast licensee to withhold rebroadcast consent as to programs in which it owns no interest merely because the request for such consent is a blanket request? The Commission says yes, and in these words: "Moreover, we are of the view to hold that Section 325(a) encompasses blanket requests for rebroadcast privileges would be seriously inconsistent with our previous interpretations of that section." (Supp. J. App. 20).

The Court of Appeals (which had no previous interpretations vulnerable to reconsideration), without purporting to construe the Act, held that petitioner's request was "patently unreasonable." But, neither the Commission nor the Court of Appeals explain why they take the view they do. And, while both have thus limited rebroadcast requests to a program-by-program basis, the Act itself does not. Where an applicant for blanket consent so conditions and limits the terms of its request as to identify by class or nature a group of programs as to which rebroadcast consent is desired, the question may well arise as to whether the limitations are reasonable, i.e., whether the grouping is such that there are no diverse considerations which might reasonably argue for consent as to some of the grouped programs, but negatively as to some others in the group. But, the mere

[11] Probably not even the respondent would contend that it has the right to authorize rebroadcasts as to programs of the sort that interest the petitioner, because petitioner is *not* interested in rebroadcasting any program originated by WBBF.

fact that wholesale consent is desired does not *ipso facto* justify a wholesale refusal.[12]

In the instant case, petitioner carefully limited its request, and sought WBBF's permission only as to programs in which WBBF did "not have any property right" and as even further clarification, petitioner's request made it clear that WBBF was not being asked to consent to the rebroadcast of "sustaining programs, the talent or subscription cost of which is paid for, by [WBBF], or a network furnishing the program material * * *." (Record p. 216, J. Supp. 95). Indeed, a licensee that in good faith wanted to stand aside from preventing rebroadcasts that might be in the public interest when it had not legitimate right to control rebroadcast thereof, would be delighted with the sort of request petitioner made of WBBF *because* the consent WBBF might so easily have given required petitioner to proceed at its own peril. Merely to say the request is "blanket" does not dispose of the reasonableness of the request, nor does it justify a refusal.

It is respectfully submitted that the six criteria that the Commission says shall govern in determining whether the refusal to authorize a rebroadcast is unreasonable[13] have no relation to the facts of economic life in the broadcast industry (if one looks at interests *other* than

---

[12] It may be observed that as a convenience to the uncontrolled (but powerful) networks, the Commission *permits* blanket requests and blanket consents; see "Note" to the Commission's regulation 3.121(b) and 3.121(e) quoted on page 5, *supra*.

[13] "The Commission has said: 'A refusal either by a network affiliate, or a non-network station, to permit a rebroadcast where based upon no reasons at all, or upon unreasonable grounds may well constitute conduct going to the qualifications of a licensee to operate in the public interest.' F.C.C. Report and Order, May 14, 1952. In the Matter of Amendment of Sections 3.191, et. al., Docket No. 9808." Footnote 3 to the first rebroadcast opinion of the Court of Appeals, 97 US App DC at 297, 231 F2d at 250.

the interests of the networks) and clearly ignore the public interest. Briefly, and in the same sequence advanced by the Commission (see text on page — *supra*), the defects in those six criteria are as follows:—

1. Re, the criteria of refusals in concert. This ignores the improper refusal by a single station—nowhere even alluded to by the Commission.

2. The question of whether the rebroadcaster serves the same area as the initial broadcaster would matter only if there were a simultaneous rebroadcast—and no one is seriously even thinking about simultaneous rebroadcasts in radio. In television, the case is otherwise.

3. When will the rebroadcast be made? If it is a slave or network station that owns no interest in the program, this factor is immaterial to it; but, the value to a rebroadcaster is to rebroadcast the program at a later date and at a different hour of the day to reach a different audience. The normal rules of economics will take care of any imaginary horribles the Commission might have been dreaming of here.

4. In its fourth criterion, by some curious means, a plural is developed—where Section 325(a) speaks only of "*the* originating station", the Commission speaks of "the originating stations", i.e., "whether the requesting station has indicated a willingness to pay a reasonable share of the legitimate costs of the originating stations [sic]." Truly that criterion is an invitation to the waltz of endless bickering—"reasonable shares"—"legitimate costs"—etc. But more to the point is the simple fact, of which this Court will doubtless take judicial notice, that the slave or network station has *no net costs* in carrying a network program: instead, it receives a profit for that time.

5. By its reference to "other persons having interests in the program" the Commission evidently segregates the

slave or network station from the sponsor-owner of the program. This Court's attention is invited to the evident fact that according to the Commission, the consent of the slave or network station is indispensible to a rebroadcast even if the full owner of that material wants to have it rebroadcast. Thus, the Commission, in its fifth criterion says that it is important to know "whether or not other persons having interests in the program have requested [of the slave or network station] or agreed [with the petitioner for consent] to the rebroadcast." In short, the Commission seems to be creating a wholly new kind of property right.[14]

Sponsor-owners of high quality programs who must compete for the favor of the networks so as to obtain the choicest hour for the presentation of their programs—both radio and TV—cannot risk the displeasure of the networks by taking the initiative in seeking rebroadcasting arrangements. Only when the law permits the real party in interest to give final and effective consent to rebroadcast requests will the public get the benefits that rebroadcasting can give. But, under the policy declared by the Commission, there can be (and in fact is) no appreciable amount of rebroadcasting. The policy the Commission has devised works to the great advantage of the networks in that they are encouraged in their cut-throat competition of scheduling the best programs they have at hours when opposing networks offer their best—each thereby forcing the public to make a final choice. Such a practice is clearly contrary to the public interest, for once the public has made its choice, it never gets to hear or see the other programs. On the other hand if rebroadcasting were encouraged (or, if

[14] It will be remembered that petitioner's request of WBBF contemplated the authorization of "other persons"—thus (see Record, p. 87) petitioner's request was limited to "programs of a sponsor or sponsors which desire, or may desire their programs rebroadcast by [petitioner]."

the Commission's policy were one which even made rebroadcasting possible) as was originally contemplated by Section 325(a), the networks' policy of cut-throat competition would be ameliorated at least to the extent of limiting its effect to the primary or initial broadcast occasion since the public would have an opportunity, at later dates, at different hours, to see or hear one or the other of the programs as to which the public would otherwise have had to have made a final choice. The policy of giving the public a chance to make a choice at its own convenience is exactly what the networks do not want, and it is exactly what the Commission's policy does not allow.

6. The sixth criterion is confusing. Read in one way, it suggests that if the program material does not have "public service" characteristics, consent to its rebroadcast can be rejected arbitrarily. If read as saying that when there are public service aspects that make wide dissemination of the program desirable the slave or network station should be sure to grant its consent, it is equally improper. This criterion so clearly violates 47 USC 326—the prohibition against censorship—that discussion is not necessary. But, it may be noted that this criterion evidently appealed strongly to the Commission since it said (see Supp. J. App. 22) "Nor does [petitioner's] request for rebroadcast privileges indicate whether the program concerned has public service aspects that make its wide dissemination clearly desirable."

47 USC, Sec. 402(b) gives to the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over appeals from the Federal Communications Commission. In light of this Court's decision in FEDERAL COMMUNICATIONS COMMISSION v WJR (1948) 337 US 265, 285, which holds that when the Court of Appeals has not decided upon the basic issue of law on the merits, the case should be remanded to that Court

for decision of such question, since the Court of Appeals did not rule on the basic issue of law in the instant case, petitioner will not urge that the initial judicial construction of Section 325(a) be made by this Court at this time. Accordingly, petitioner suggests that this Court grant certiorari and remand to the Court of Appeals with directions to determine whether the term "originating station" in the statute is properly interpreted by the Commission to include a slave or network station that does not own any part of the program to be rebroadcast; or, in other words, whether a station seeking rebroadcast authority must obtain the consent of the station whose signal it receives when that station has been paid in full for the use of its facilities and owns no interest in the material disseminated by its signal.

The importance of the criteria by which requests for rebroadcasting privileges may be refused is, to the public and the radio industry (which still includes independent broadcasters) obvious. Petitioner urged in the Court of Appeals that those followed by the Commission were untenable. But, neither that Court nor any other has assayed those precepts which are of such vital importance. This Court should ascertain whether they are valid, or, in the alternative, should direct the Court of Appeals to do so, as indicated in FEDERAL COMMUNICATIONS COMMISSION v WJR, *supra*.

CONCLUSION

The questions here presented can fairly be said to be of such importance as to call for this Court's action. The writ should issue, and this Court resolve the questions themselves or, in the alternative, remand to the Court of Appeals with instruction to determine same.

Respectfully submitted,

CHARLES F. O'NEALL
1625 K Street, N.W.
Washington 6, D. C.

Attorney for Petitioner

Of Counsel:

FRANCIS C. BROOKE
Washington, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958.

No. 14,418

FEDERAL BROADCASTING SYSTEM, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WBBF, INC., INTERVENOR

Filed: April 2, 1959
Joseph W. Stewart, Clerk

Appeal from Decision and Order of the Federal Communications Commission.

Before: BAZELON, WASHINGTON and BASTIAN, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the Federal Communications Commission on appeal in this case are affirmed.

Per Curiam.

Dated: April 2, 1959.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14418

FEDERAL BROADCASTING SYSTEM, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WBBF, INC., INTERVENOR

Appeal from a Decision of the Federal Communications Commission

---

Decided April 2, 1959

Mr. Charles F. O'Neall for appellant.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, for appellee. *Messrs. John L. Fitzgerald*, General Counsel, Federal Communications Commission, *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, at the time the brief was filed, and *Mark E. Fields*, Counsel, Federal Communications Commission, were on the brief for appellee.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief for intervenor.

Before BAZELON, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This controversy involves a protest, under § 309(*c*) of the Federal Communications Act,[1] by appel-

[1] The protest was filed under the provisions of § 309(c), as existent prior to amendment in 1956. Added by ch. 879, 66 STAT. 715 (1952). See text at note 3 *infra*.

iant, a radio station licensee, against the renewal of the broadcasting license of its competitor, radio station WBBF. The protest, as summarized in our opinion in an earlier appeal in this controversy,[2] charged:

> (1) that WBBF was chargeable with "arbitrary refusal to grant consent pursuant to Section 325 (a) of the [Communications] Act . . . for Station WSAY to rebroadcast sponsors' programs", and (2) that WBBF had put in effect an arrangement whereby advertisers who patronized both WBBF and another radio broadcasting station under common control with it and partly overlapping its service area would receive a 25% discount from the usual rates, constituting unfair competition and causing Federal Broadcasting a loss of some $16,000 in advertising accounts.

The Commission dismissed "for failure to specify with particularity facts, matters, and things relied upon which warrant the designation of the WBBF application for hearing under Section 309(c) of the Communications Act." On the earlier appeal, we held the dismissal erroneous and remanded the case to the Commission for further proceedings. We noted, however, that since argument of the appeal before this court, § 309(c) had been amended to permit the Commission to treat a protest as if on demurrer.[3] We expressly reserved opinion on the applicability of the revised procedure to this case on remand.

On remand, the Commission invoked the "demurrer" procedure: It heard oral argument on whether the facts alleged in the protest constitute sufficient grounds for setting aside WBBF's license renewal, and concluded that

---

[2] *Federal Broadcasting System* v. *Federal Communications Comm'n*, 97 U.S.App.D.C. 293, 295, 231 F.2d 246, 248 (1956).

[3] As amended, 70 STAT. 3 (1956), 47 U.S.C. § 309(c) (Supp. V, 1958).

they did not.[4] Accordingly it affirmed its grant of license renewal to WBBF. The present appeal followed.

At the outset appellant complains that the Commission erred in applying the demurrer procedure of § 309(c), as amended. We think not. *Federal Braodcasting System* v. *Federal Communications Comm'n*, 99 U.S.App.D.C. 320, 239 F.2d 941 (1956).[5]

Concerning appellant's request for rebroadcasting privileges, the Commission determined that appellant had sought essentially blanket authorization to rebroadcast all programs carried by WBBF in which WBBF may have no proprietary interest. It concluded, *inter alia*, that WBBF was justified in refusing to grant such authorization absent (1) more specificity as to the programs Federal sought to rebroadcast, the time they would be rebroadcast, and the financial provisions to be made for such rebroadcast privileges or (2) a showing that WBBF acted in concert with another station, or other interests in refusing the request.

We think the commission's action in rejecting this ground of the protest was correct because the request for rebroadcast authority was patently unreasonable in scope.[6]

As to appellant's objections to the discount WBBF and its associate station allowed to advertisers purchasing

---

[4] The oral argument was interrupted by a mock air raid alert, and, by agreement of the parties and the Commission, the remainder of the argument was conducted by written brief.

[5] That appeal, although prosecuted by appellant in the suit now before us, arose out of a matter entirely unrelated to the instant proceedings.

[6] We do not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a) of the Communications Act, as expressed in the 1952 rule making proceedings to amend the rebroadcast rules. See *Report on Amendment of the Rebroadcasting Rules*, 1 PIKE & FISCHER RADIO REG. (Pt. 3) 91:1131 and 1136.

time on both stations, the Commission noted that discounts allowed for such joint advertising are not *per se* unreasonable. It also noted that there is considerable overlap in service area between WBBF and its associated and mutually owned station, and that appellant does not assert either that the stations require advertisers to advertise on both stations, or that Federal's monetary loss resulting from the joint advertising practice would in any way impair Federal's ability to broadcast in the public interest. It thereupon concluded that the joint advertising practice was not contrary to the public interest, and in no way demonstrated the unfitness of WBBF to hold its license. In these circumstances, we cannot say that the Commission erred in failing to disapprove of the joint advertising discounts.

Nor do we find merit in the other objections raised by appellant.

Affirmed.

FILE COPY

Office Supreme Court, U.S.
D
JUL 31 1959
JAMES R. BROWNING, Clerk

No. 168

IN THE

Supreme Court of the United States

October Term, 1959

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WBBF, INC. IN OPPOSITION

JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
MCKENNA & WILKINSON
1735 DeSales Street, N.W.
Washington 6, D. C.
Counsel for WBBF, Inc.

WILSON - EPES PRINTING CO - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	5
CONCLUSION	8

CITATIONS

Federal Broadcasting System v. *Federal Communications Commission*, 97 U.S. App. D.C. 293, 231 F.2d 246 (1956)	5
Federal Broadcasting System v. *American Broadcasting Co.*, 167 F.2d 349 (C.A. 2, 1948) *cert. den.* 335 U.S. 821	7
National Broadcasting Company v. *United States*, 319 U.S. 190	7

STATUTES AND REGULATIONS

Administrative Procedure Act	
5 U.S.C. Sec. 1008(b)	5
Federal Communications Act of 1934, as amended	
47 U.S.C. Sec. 303(r)	2
47 U.S.C. Sec. 309(e)	2, 4, 5
47 U.S.C. Sec. 325(a)	2, 3, 6, 7
Judicial Code	
28 U.S.C. Sec. 1254(1)	2

MISCELLANEOUS

24 FCC 179 (1958)	1
1 Pike & Fischer, *Radio Regulation*, 51:65	5

Page

Amendment of Rebroadcasting Rules, 1 Pike & Fischer, *Radio Regulation*, Part III, p. 91:1136 3
Amendment of Rebroadcasting Rules, 9 Pike & Fischer, *Radio Regulation*, 350 3

IN THE

Supreme Court of the United States

October Term, 1959

No. 168

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WBBF, INC. IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below (Pet. App. 25-28) is reported at 266 F.2d 922. The decision of the Federal Communications Commission (R. 149-162) is reported at 24 FCC 179 (1958).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action of the Commission renewing the license of radio station WBBF, Rochester, New York, for the period June 1, 1954 to June 1, 1957, was entered on April 2, 1959 (Pet. App. 24). The petition for a writ of certiorari was filed

July 1, 1959. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Commission, pursuant to modified procedures adopted by Congress in 1956 (47 U.S.C. Sec. 309(c)), permitting that agency to dismiss a protest without an evidentiary hearing where it concludes, after oral argument, that the allegations in the protest (even if proved) would not invalidate the challenged grant, properly rejected petitioner's pleading protesting a renewal of station WBBF's license.

STATUTES INVOLVED

Section 325(a) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 325(a)), is set out at pages 3-4 of the petition. The pertinent protest provisions of that Act (47 U.S.C. Sec. 309(c)) are set out in the Government's brief in opposition.

STATEMENT

Stated chronologically, the following background facts are pertinent to the instant petition to review the judgment of the court below, affirming action taken by the Commission (following an earlier remand) dismissing after oral argument petitioner's pleading protesting the renewal of station WBBF's license for the period June 1, 1954 to June 1, 1957:

Section 325(a) of the Communications Act of 1934 (47 U.S.C. Sec. 325(a)) provides that no station shall "rebroadcast the program or any part thereof of another broadcasting station without the *express* authority of the *originating* station."[1] In 1950 (pursuant to 47 U.S.C. Sec. 303(r)), the Commission instituted rule-making proceed-

[1] Emphasis supplied throughout this brief.

ings with a view to adopting regulations designed to clarify the term "originating station" and the conditions under which a station could properly refuse to grant "rebroadcast" privileges. After carefully studying the legislative history of Section 325 (J.A. 38-41)[1] and comments filed by interested persons, the Commission held that the station whose signal was "picked up" by another station for rebroadcast purposes was the "originating station" (J.A. 39, 45). Although of the opinion that arbitrary and unreasonable refusals by the "originating station" of requests by other stations to "rebroadcast" *particular* programs might constitute conduct affecting a licensee's qualifications, the Commission concluded that in many if not most instances a denial of rebroadcast privileges would be fully justified, that blanket requests addressed to the originating station for rebroadcast privileges could not be used to appropriate the property rights of others in particular programs, and that refusals to permit "rebroadcasts" would have to be considered "on a case-to-case basis . . . in the context of *all the facts* surrounding any particular controversy". J.A. 48; *Amendment of Rebroadcasting Rules*, 1 Pike & Fischer, *Radio Regulation*, Pt. III, p. 91:1136 (1952); 9 Pike & Fischer, *Radio Regulation*, 350, 352 (1953).

Gordon P. Brown, general manager of station WSAY, Rochester, N. Y., and petitioner's sole stockholder, actively participated in that proceeding (J.A. 38, 45; 9 Pike & Fischer, *Radio Regulation*, 350). Though the Commission's Opinions and Orders of October 29, 1952 and May 13, 1953 in that proceeding rejected his views regarding the scope and purpose of 47 U.S.C. Sec. 325(a), neither he nor petitioner took any appeal therefrom.

[1] The instant litigation was before the court below once previously. Since the records and printed joint appendices used in the two appeals were not consecutively paginated, the record on the first appeal will be here cited as "J.A." and on the second appeal as "R."

Shortly thereafter respondent filed an application (see J.A. 1) to acquire 100% of the stock of WARC, Inc. (now WBBF, Inc.). Petitioner seized upon this application as a vehicle by which to reargue Mr. Brown's "rebroadcast" contentions, asserting that the sellers of station WARC (now station WBBF) had refused to grant blanket rebroadcast privileges sought by station WSAY licensed to petitioner (J.A. 1-37). The Commission notwithstanding these objections granted its consent to the transfer on August 26, 1953 (J.A. 23), which the purchasers consummated the next day (see J.A. 55). A petition for reconsideration of the aforesaid transfer was denied by the Commission on May 20, 1954 (see J.A. 104-105). Petitioner took no appeal therefrom.

However, by separate action, likewise taken on May 20, 1954, the Commission renewed WBBF's license for the three-year period ending June 1, 1957 (see J.A. 105). Petitioner protested that grant in a pleading filed June 18, 1954, contending (so far as here pertinent) that its blanket requests for rebroadcast authority had been turned down by WBBF (J.A. 67-103). In a response to that pleading it was pointed out that all the requests for rebroadcast authority (as borne out by the attachments to the protest) had been addressed to the former owners of WBBF and that the protest contained no assertion (since it was not *then* the fact) that WSAY had ever made a demand on the *new* owners of WBBF for rebroadcast privileges (J.A. 104-109). The Commission denied the protest (and a subsequent petition for reconsideration thereof) on the premise that the pleadings failed to state any public interest considerations with the degree of particularity required by 47 U.S.C. Sec. 309(c) (J.A. 111-130).

On an appeal therefrom (J.A. 131-132), the court below reversed, holding that the questions which petitioner had sought to raise should have been disposed of by the

Commission on their merits. *Federal Broadcasting System* v. *Federal Communications Commission*, 97 U.S. App. D.C. 293, 231 F.2d 246 (1956). However, in remanding the case to the Commission, the Court expressly stated (p. 297) that it should not "be understood as saying that the Commission may not ultimately—for some good reason—be able to justify a denial of the protest *without hearing*." The Court further noted (p. 298) that it was not then passing on the effect, on matters raised in the protest, of intervening legislative changes in 47 U.S.C. Sec. 309(c).

Following that remand and after hearing oral argument on the protest (R. 58-62), the Commission in a Decision released March 14, 1958 (R. 149-162) concluded that the matters raised in the protest, even if proved, would not warrant a denial of WBBF's renewal, that those matters could, therefore, be disposed of "as on demurrer" under the protest statute as amended in 1956, and accordingly reaffirmed its former action granting WBBF a three-year renewal of its license (June 1, 1954-June 1, 1957).[1] From a *per curiam* affirmance of *that* decision by the court below, petitioner now seeks certiorari

ARGUMENT

As brought out in the foregoing Statement, petitioner was twice told by the Commission (at the time of the 1950-1953 rule-making proceeding and again in connection with the transfer of station WBBF to respondent) that a broadcast station need not honor "blanket requests" for rebroadcast privileges, and hence that a denial of requests of that type would not reflect adversely on a licensee's character qualifications. Instead of challenging

[1] Since June 1, 1957, pending a resolution of the instant litigation, Station WBBF has been operating under a temporary license pursuant to Section 1.65 of the Commission's Rules (1 Pike & Fischer, *Radio Regulation* 51:65; cf. 5 USC sec. 1008(b)).

the Commission's Report on Rebroadcasting by a direct appeal, petitioner now attacks collaterally the conclusions there reached—by arguing that the Commission has misconstrued 47 U.S.C. Sec. 325(a), and that WBBF's refusal to entertain blanket requests for rebroadcast privileges adversely reflects on WBBF's character qualifications and "demonstrates unfitness on respondent's part to continue as a licensee" (Pet. 7).

Petitioner's protest was dismissed by the Commission on two grounds: (1) because of the sweeping character of WSAY's request to rebroadcast substantially all programs carried by WBBF; and (2) because the interpretation which petitioner sought to place on 47 U.S.C. Sec. 325(a) was inconsistent with conclusions reached by the Commission in its 1950-1953 rule-making proceeding (R. 149-162). As petitioner recognizes (Pet. 8, 10, 15), the court below affirmed on the first ground, finding it unnecessary to pass on the correctness of the Commission's pronouncements in the earlier rule-making proceeding. Hence, the question of statutory construction pressed in the petition (Pet. 2) need not here be resolved, if the allegations in petitioner's protest did not present matters which (if proved) would demonstrate respondent's unfitness to continue as a licensee (Pet. 7).

Whether the Commission's pronouncements in its earlier rule-making report were right or wrong, they were not so clearly erroneous, made as they were by the agency charged by Congress with the administration of the Communications Act, that adherence by WBBF to the views there expressed by the Commission would besmirch WBBF's character or disqualify WBBF as a broadcast licensee.

Certainly, in line with requirements laid down in its earlier Report, the Commission can insist that a pleading complaining of a station's refusal to accord another station rebroadcast privileges be documented in some detail

—by describing the particular program for which rebroadcast permission was sought, the proposed time of such rebroadcast (whether simultaneous or at a subsequent date), the rights of others in the program in question, etc.[1]

Since petitioner's protest was predicated on a "blanket request" (see J.A. 85), which WBBF turned down in reliance upon the Commission's carefully considered rule-making report (J.A. 96), from which petitioner took no direct appeal, it necessarily follows that, even if the Commission in that report misconstrued the language or intendment of 47 U.S.C. Sec. 325(a), WBBF should not be penalized by having its license renewal denied.

In short, the instant petition presents not a question of the proper construction of the rebroadcast provisions of the Communications Act, but rather a question relating to the sufficiency of particular allegations in a given pleading seeking to impugn the Commission's action renewing the license of a station which has complied with the Commission's pronouncements relating to rebroadcasts and otherwise operated in the public interest.

---

[1] Throughout its petition (pp. 2, 3, 4, 7, 10, 11, 14, 16, 17, 18, 19, 20, 22), Federal Broadcasting System assumes that a station has no "proprietary interests" in network-produced shows which it carries. Though not directly in issue, respondent does not acquiesce in that assumption. Under the "territorial exclusivity" provisions of the Commission's network rules, sustained by this Court in *National Broadcasting Company* v. *United States*, 319 U.S. 190, a station has a "first refusal" of the programs of the network with which it is affiliated in the community to which it is licensed. By carrying network shows at a fraction of its card rate, a station *pays* for such "exclusivity" and is, therefore, in a position to object to other stations picking up its signal and rebroadcasting those shows, simultaneously or on a delayed basis, particularly where the stations which are thus reaping where they haven't sown do not share in the original cost of obtaining such programs. That the networks can determine which stations may carry their programs in a given community has been sustained by the courts in litigation to which petitioner was a party. *Federal Broadcasting System* v. *American Broadcasting Co.*, 167 F.2d 349 (C.A. 2, 1948), *cert. den.* 335 U.S. 821.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
MCKENNA & WILKINSON
1735 DeSales Street, N.W.
Washington 6, D. C.
Counsel for WBBF, Inc.

July 31, 1959

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Caples Company, The v. *United States*, 243 F. 2d 232	8
Federal Broadcasting System v. *Federal Communications Commission*, 231 F. 2d 246	4

Statutes and Regulations:

Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. Supp. V, 151, *et seq.*:	
Section 309(c)	2, 3, 4
Section 325(a)	5, 6, 7
17 F.R. 4711	5
17 F.R. 10309	5

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 168

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND WBBF, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-28) is reported at 266 F.2d 922. The decision and order of the Federal Communications Commission is reported at 24 F.C.C. 179.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1959. The petition for certiorari was

filed on July 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission properly rejected petitioner's protest against the grant of license renewal of radio station WBBF on the grounds that WBBF had not engaged in conduct contrary to the public interest or otherwise demonstrated unfitness to be a broadcast licensee by refusing to grant petitioner's request for blanket authorization to rebroadcast all WBBF programs in which WBBF had no proprietary interest.

STATUTE INVOLVED

The pertinent provision of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C., Supp. V, 151, *et seq.*), in addition to those set forth in the Petition, pp. 3-4, is as follows:

> Sec. 309(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made.

or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. * * *

STATEMENT

On May 20, 1954, the Federal Communications Commission granted the application of WBBF, Inc. for renewal of its standard broadcast license in Rochester, New York (R. 7). Petitioner filed a protest against this action pursuant to Section 309(c) of the Communications Act, alleging that renewal was contrary to the public interest for two reasons: (1) petitioner, who operated standard broadcast Station WSAY in Rochester, had requested blanket permission from WBBF to rebroadcast any of its programs for which a network or sponsor had paid production costs, and WBBF had refused such permission; and (2) WBBF, Inc., which also owned Station WGVA in Geneva, New York, was offering advertisers a lower, combination rate if they would buy time on both stations, thus allegedly competing unfairly with petitioner's station and impairing its ability to operate in the

public interest (R. 9). The Commission, on July 16, 1954, dismissed the protest on the ground that the protest did not meet the statutory requirement of Section 309(c) of the Communications Act, in that facts were not specified with particularity showing why WBBF's license should not be renewed (R. 9-10).

The court of appeals reversed, holding that petitioner had met the statutory test as to particularity. *Federal Broadcasting System* v. *Federal Communications Commission*, 231 F. 2d 246 (C.A.D.C.). Upon remand, the Commission, in conformity with the appended provisions of Section 309(c), ordered oral argument on the question whether, if the facts alleged in the protest were to be proven, grounds would be presented for setting aside the grant of WBBF's renewal application (R. 1-7). Thereafter, on March 14, 1958, the Commission issued its decision rejecting petitioner's protest on the merits and affirming the renewal of WBBF's license (R. 7-26).

The facts, with respect to the rebroadcasting issue, were that petitioner had requested permission "to rebroadcast" WBBF's programs when they were "programs of a sponsor, or sponsors, which desire, or may desire their programs rebroadcast by Station WSAY" (R. 18). Such "blanket permission", petitioner had informed WBBF, was necessary because it "intend[ed] to negotiate with all of [the sponsors of such programs] for the rebroadcasting of their programs, and we must be able to assure them that their programs can be rebroadcast as far as your

station is concerned, before we can proceed further in our negotiations" (R. 19, n. 11). WBBF had rejected petitioner's request stating (R. 18):

> In view of the blanket, unqualified, unspecific, and unlimited nature of your request, and the absence of such pertinent information as the particular programs which you wish to rebroadcast, the time when you wish to carry them, the terms and arrangements which you are willing to offer, etc., we cannot determine that the public interest would be served by granting your request.

The Commission, in concluding that WBBF's refusal to grant such blanket permission for rebroadcast privileges was not grounds for denying renewal of its license, referred first (R. 20-21), "as background," to prior rule-making proceedings in 1952 concerning rebroadcasting (*Report on Amendment of Rebroadcasting Rules*, 17 F.R. 4711), in which it had construed the term "originating station", appearing in Section 325(a) of the Communications Act, as referring solely to the stations whose signals are physically intercepted and retransmitted, irrespective of the source or ownership of the program material involved (17 F.R. at 4712). It also referred to a subsequent order in this proceeding in which the Commission had set forth in detail the circumstances under which refusal by such an originating station of permission to rebroadcast its signals might be an abuse of its power under Section 325(a), and thus raise public interest questions (17 F.R. 10309-10).

Turning to the circumstances of the instant case,

alleged to show an abuse of power by WBBF (R. 21-23), the Commission, noting that WBBF and the petitioner serve the same area in and around Rochester, found that WBBF was justified in denying the blanket authorization petitioner requested in the absence of (1) more specificity as to the exact circumstances under which particular programs would be rebroadcast, or (2) a showing that WBBF "acted in concert with another station or other interests in refusing" the request (R. 21-23).[1] Rejecting petitioner's arguments on other matters not here pertinent, the Commission concluded that the protest presented no grounds for setting aside WBBF's license renewal and affirmed the grant (R. 26).

The court of appeals unanimously affirmed the action of the Commission (Pet. App. 25-28), holding (Pet. App. 27) that the Commission correctly rejected the rebroadcast portion of petitioner's protest "because the request for rebroadcast authority was patently unreasonable in scope". The court did not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of Section 325(a), as expressed in the 1952 rule-

[1] It also stated that requiring the honoring of blanket rebroadcast requests would be inconsistent with the Commission's previous interpretations of the meaning of Section 325(a), and a refusal of rebroadcasting privileges would raise questions as to a station's qualifications only where the request is to rebroadcast a program "having such public service aspects as to make its wide dissemination to the public clearly desirable" and the refusal is without reason or based on unreasonable grounds (R. 23). The court of appeals found it unnecessary to pass upon the validity of these alternative grounds.

making proceedings to amend the rebroadcast rules (*ibid.*).

ARGUMENT

The petition for certiorari presents no question of general importance warranting review.

Petitioner's principal contention, that the Commission has misconstrued the term "originating station" in Section 325(a) of the Communications Act (Pet. 9-17), is not properly presented by this case. The court below, affirming the Commission determination that WBBF's refusal of blanket rebroadcast rights to petitioner did not "constitute sufficient grounds for setting aside WBBF's license renewal", found it unnecessary to pass on the validity of the 1952 Commission rule-making proceedings in which the Commission had interpreted the term "originating station" (Pet. App. 27, n. 6). The court decided that the request for rebroadcast authority which petitioner made upon WBBF was "patently unreasonable", and that the Commission was therefore "correct" in finding WBBF "justified in refusing to grant such authority" in the absence of "more specificity" as to the details of the proposed rebroadcasts, or any showing WBBF had acted in concert with any other party in refusing the request (Pet. App. 27).

Petitioner urges that if, as it contends, WBBF was not the "originating station" of the programs in issue, it would have no power under Section 325 (a) to deny rebroadcast authorization, as it did here. Therefore, it is argued, the proper construction of the statute was necessarily before the court of ap-

peals. However, assuming *arguendo* that the Commission's construction of "originating station" was erroneous, it would not follow that its decision to renew the WBBF license would have to be set aside, for no question is raised as to WBBF's qualifications to be a licensee merely because it acted as an originating station, in accordance with the settled rulings of the Commission, and passed upon requests for rebroadcast permission made to it by the petitioner.[2] If petitioner believes, contrary to the position of the Commission, that rebroadcast permission is not required where a station has no ownership interest in the program material transmitted, it is free to bypass WBBF altogether and deal directly with the network or program ponsor. And if the outstanding Commission determination stands in the way of such negotiations, petitioner may be in a position to seek a declaratory ruling as to its rights in the courts, presumably after first seeking such a ruling from the Commission. See *The Caples Company* v. *United States*, 243 F. 2d 232 (C.A.D.C.). But it cannot challenge WBBF's qualifications to be a licensee through a collateral attack upon the Commission's rules under which WBBF operated.

---

[2] Nothing in the record before the Commission indicates WBBF did, or threatened to do, anything other than respond to a request petitioner made to it. WBBF is not alleged to have brought pressure upon the sponsors or network to have them refrain from authorizing petitioner to rebroadcast the programs in issue or to have threatened petitioner with any action should it rebroadcast their programs without securing WBBF's permission.

Petitioner's subsidiary challenge (Pet. 17-22) to the specific Commission finding that its blanket request for rebroadcast rights was deficient consists, to a large degree, of an attack upon the criteria announced by the Commission in its 1952 rule-making proceedings for determining whether refusal of a particular request for rebroadcast privileges is unreasonable (see Pet. 18-21). The court below, however, did not pass upon the propriety of the criteria in affirming the Commission's action here. Nor did the Commission itself purport to apply these criteria in ruling upon WBBF's conduct. Instead, it concluded (R. 22) that WBBF's refusal to grant the sweeping rebroadcast permission petitioner sought was justified because of the lack of pertinent information in petitioner's blanket request upon which a proper determination by the station as to whether permission should be granted or denied could have been based. This determination was clearly within the Commission's authority.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

JOHN L. FITZGERALD,
General Counsel,

MAX D. PAGLIN,
Assistant General Counsel,

RUTH V. REEL,
Counsel,
Federal Communications Commission.

JULY 1959

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 515661 120